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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

Docket No. 77-268

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,
Petitioner,

—against—

VANA TRADING CO., INC.,
Respondent.

RESPONDENT VANA'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent Vana Trading Co., Inc., prays that Flota's Petition for a Writ of Certiorari be denied. The decision of the Court of Appeals for the Second Circuit is not in conflict with other Circuits; and the question of federal law presented here has been settled by this Court.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York was reported at 415 F.Supp. 884 (1976), and is printed as Appendix A to Flota's Petition.

The opinion of the United States Court of Appeals for the Second Circuit was reported at 556 F.2d 100 (1977), and is printed as Appendix C to Flota's Petition.

Statutory Provisions

In addition to Sections 1304(2)(m) and (n) of the Carriage of Goods by Sea Act (COGSA), 1936, 46 U.S.C. § 1300 *et seq.*, which have been cited by Petitioner, this case also involves Flota's non-delegable duty under COGSA, 46 U.S.C. § 1303(2):

> "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

Reasons for Denying Flota's Petition for a Writ of Certiorari

I

The Second Circuit did not err in Rejecting the Application of *Reliable Transfer* to this Disputed Ocean Cargo Damage Action.

The correct rule of damages with respect to this cargo damage action, and the proper party upon which falls the burden of apportioning those damages, was determined by the United States Supreme Court in *Schnell* v. *The Vallescura,* 293 U.S. 296 (1934), and preceded its decision in the stranding and collision case of *United States* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975), by over forty years. In an action for cargo damage, where the bona fide purchaser-consignee shows receipt by the ocean carrier in good order, and delivery in damaged condition, the consignee is entitled to a full recovery of its damages, except as to that portion of the loss which the carrier succeeds in bringing within some statutory exemption or valid contractual exception from liability, and as to which, it must bear the burden of apportionment when it is shown to be contributory to the loss. *Schnell* v. *The Vallescura, supra.*

As Petitioner Flota itself so strongly urged before the Second Circuit:

> "*Reliable, supra,* is limited solely to a [sic] collision and stranding cases and cannot be extended to an action to recover for cargo damage."

Flota's Brief on Appeal to the Court of Appeals for the Second Circuit, at 38.

Petitioner's reliance on *Cooper Stevedoring Co.* v. *Kopke, Inc.,* 417 U.S. 106 (1974), is wholly misplaced. As Petitioner's first question presented to the Court is framed, it might be supposed that a fresh opportunity is now being presented to this Court to further clarify the question of contribution among joint tort-feasors in maritime cases. Such clarification is hardly necessary since *Cooper Stevedoring,* which clarified *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.,* 342 U.S. 282 (1952), in light of this Court's actions in *Atlantic Coast Line R.R.* v. *Erie Lackawana R.R.,* 406 U.S. 340 (1972), and *Seaboard Shipping Corp.* v. *Moran Inland Waterways Corp.,* 449 F.2d 132 (2d Cir.), *cert. denied,* 406 U.S. 949 (1972).

There is nothing to distinguish this case from the usual cargo damage action, except a District Court opinion originally delivered from the bench, which departed from the well-defined course of settled cargo law. The District Court's Opinion, which announced the application of proportionate fault, was appealed by all parties, including Petitioner Flota.

The Second Circuit put the parties back on the proper legal course, and the defendant has now arrived in port at the Supreme Court with the startling reverse argument that *Reliable Transfer, supra,* applies—the first time such a position has been argued by any party to this action.

Rarely in the considerable body of case law on damage to cargo carried under a bill of lading contract does one find

the mechanics of the burdens of proof so clearly presented, as in the decision of the Second Circuit now being appealed.

Flota's Petition here may be traced to its obvious dissatisfaction with having been left with the final burden of proof, as to which it adduced no evidence, and called not one witness. Petitioner's cries of unfairness as to result would be understood better, had it not made the tactical determination to rest its case without introducing such evidence.

The stability of cargo damage law is not being challenged by anyone except Petitioner. The compelling reasons leading to the granting of certiorari in *Reliable Transfer, supra,* to consider the continued validity of the American divided damages rule in collision and stranding actions, are not present in the instant action. United States courts, in applying the settled rules of cargo damage law, have not done so with any ill-disguised reluctance. Dissatisfaction with the rules have not been made manifest by text writers. Divergence of result among circuits is nowhere evident. The United States is not, in this area of cargo law, out-of-step with the remainder of the maritime world.

The old 50-50 collision law was adopted in the United States because it was then the prevailing rule in England. The 1910 Brussels Collision Convention changed the rule for most of the maritime world, but the United States did not follow suit. *Reliable Transfer,* 421 U.S. at 402-04. With respect to cargo law, just the opposite situation is presented. With the United States' adherence to the Hague Rules, in the form of the Carriage of Goods By Sea Act (COGSA), 46 U.S.C. § 1300 *et seq.,* virtually all maritime nations are presently in step as to the law applicable to cargo damage. *Robert C. Herd & Co.* v. *Krawill Machinery Corp.,* 359 U.S. 297, 301 (1959).

II

The Cogsa Defense of Insufficient Packing is not a Complete Defense.

Part (a) of Flota's second question presents the unique argument that it should be excused for its COGSA, 46 U.S.C. § 1303(2) negligence in stowage and carriage, since it was able to suggest that some of the damage was attributable to a 46 U.S.C. § 1304(2)(n) packaging exception.

Section 1303(2) of COGSA reads:

> "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

Flota's claim that the Section 1304(2)(n) statutory packaging exception was intended to be a complete defense, totally ignores the fact that the carrier's Section 1303(2) duty of proper stowage and carriage is also statutory, and is absolutely non-delegable. *Nichimen Co.* v. *M.V. Farland,* 462 F.2d 319, 330 (2d Cir. 1972); *Inland Waterways Shippers Ass'n, Inc.* v. *Mississippi Valley Barge Line Co.,* 194 F.Supp. 818, 822 (E.D.Mo. 1960), *aff'd,* 289 F.2d 374, 380 (8th Cir.), *cert. denied,* 368 U.S. 876 (1961).

It is clear that numerous of the defenses of Section 1304(2) are not complete defenses. The language of the section itself does not presume to suggest a complete indemnity for of all those defenses. It is simply a question of which party has the burden of proof. That this is so, is amply demonstrated by the conditions surrounding the Section 1304(2)(q) exception respecting "any other cause" of damage. As to this particular "any other cause" exception, the burden is specificially placed by the Act on the person claiming its benefit (usually the ocean carrier), to show that there is no other negligence contributing to the loss. As to the Section 1304(a)-(p) exceptions the burden

returns to the party against whom the exception is raised, to go forward if possible, to show such contributing negligence as may be relevant. See *G. Gilmore & C. L. Black, Jr., The Law of Admiralty* § 3-43, at 184 (2d ed. 1975).

Such was the decision of this Court under The Harter Act, 1893, 46 U.S.C. § 190, *et seq.*, in *Schnell* v. *The Vallescura,* 293 U.S. 296 (1934), in holding that the defense of Act of God was not a complete defense; and Congress did not reverse this Court when it enacted COGSA in 1936, and included the Act of God defense as one of the Section 1304(2) exceptions. The general rule still stands that a common carrier may not exempt itself from responsibility for loss or damage to cargo caused by its own negligence respecting that cargo. COGSA, 46 U.S.C. § 1303(2); The Harter Act, 46 U.S.C. § 190; Opinion, Petitioner's Appendix C, page 20a, and n.10.

III

The *Niel Maersk* does not apply where good order and condition on shipment is established.

Part (b) of Flota's second question gets to the heart of its Petition, claiming that the Circuit Court should have applied the "doctrine" of the *Niel Maersk,* 91 F.2d 932 (2d Cir.), *cert. denied,* 302 U.S. 753 (1937). But the *Niel Maersk* does not represent a doctrine. It is only a case in which the Circuit Court found that the cargo claimant had not sustained its initial burden of proof as to the condition of the cargo on shipment, and reversed the District Court which thought otherwise.

The *Neil Maersk* does not vitiate the rule of damages applicable to this case, first established by *Schnell* v. *The Vallescura, supra.* Faced with Respondent's showing of good order and condition on shipment, damage on delivery,

and carrier negligence, the Petitioner failed to adduce any evidence of apportionment on trial as to what part of the damage had been caused by the packing, and what part by poor stowage, ventilation, or other factors. Petitioner did not call a single witness to carry its burden of proof in this regard and as the Circuit Court noted, Opinion, Petitioner's Appendix C, page 22a, there is no support in the record for any finding in this regard.

The only avenue left to Petitioner here, other than the *Reliable Transfer* argument which it had never before made, was therefore to suggest once again that because of certain possible causes of damage, the cargo was not in good order upon shipment.

In Flota's Petition, these arguments have been once again dredged up with such flair as to imply, incorrectly, that there was even some support on the record for them. Thus, at pages 7-8 of the Petition, the possible causes of damage are said to include rodents, insects, and other vermin. There was no testimony on the record to support such damage, the reluctant admission of which was drawn from counsel by the Court of Appeals on oral argument. The trial court found good order sustained by the evidence; and the Circuit Court found that fact overwhelmingly supported, and not clearly erroneous. Opinion, Petitioner's Appendix C, page 19a, and n.9.

The same implications as to possibilities again appear at page 9 of the Petition, in the argument that there were latent defects, or inherent vice. Yet, again, there was no support in the record for such findings. Opinion, Petitioner's Appendix C, page 17a.

As to causal factors and proximate cause, the trial court's findings of negligent stowage during transit, and poor handling on discharge, coupled with what Judge Pollack felt was unsuitable packing, all combining to cause the loss, have all been held by the Circuit Court to be "not clearly erroneous."

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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